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No. 79-1321

In the Supreme Court of the United States

OCTOBER TERM, 1979

OM PRAKASH JAIN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 612 F. 2d 683. The opinions of the District Director (Pet. App. 22a-24a), the immigration judge (Pet. App. 17a-21a), and the Board of Immigration Appeals (Pet. App. 14a-16a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1979. The petition for a writ of certiorari was filed on February 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Attorney General abused his discretion in denying petitioner's request for adjustment of status to that of a permanent resident alien.

2. Whether the courts of appeals have jurisdiction to review the denial of adjustment of status in the context of a deportation proceeding.

3. Whether due process requires that an alien be afforded an opportunity, in addition to that provided in the context of a deportation proceeding, to contest the denial of his request for adjustment of status.

STATEMENT

1. Petitioner has resided in the United States, by virtue of a four-month business visitor visa, since January 1976 (Pet. App. 3a). He had previously entered the United States as a business visitor on two other occasions (*id.* at 2a-4a). In June 1974 petitioner came to the United States on a nonimmigrant business visa as the proprietor and business representative of an Indian company that purportedly exported gems, beads, and semiprecious stones (R. 122-123).[1] Approximately four or five weeks later, he left the United States, without having transacted any business (R. 36). In September 1975 petitioner again visited the United States as the representative and proprietor of that firm (R. 35, 37, 122-123). He departed four weeks later, having again failed to obtain any orders for his merchandise (R. 37).

During petitioner's second visit, however, he engaged an attorney, who assisted him in creating an American-based import company, Asian Imports, which was purportedly located in the hotel where petitioner was staying (R. 57, 144). Petitioner obtained both a certificate of business for this new venture and a social security number for himself (R. 37). Having completed these

[1]"R." refers to the certified administrative record.

preliminary business arrangements, petitioner returned to India. Within two months, he had liquidated his Indian export firm by turning it over to his brother (R. 41).

On January 13, 1976, petitioner reentered the United States on a four-month nonimmigrant business visa with the ostensible purpose of transacting business for the Indian export firm (R. 122-123).[2] The actual purpose of petitioner's third entry into the United States, however, was to conduct the business of Asian Imports, the new company for which he had obtained the business certificate during his second visit and which he now operated from his hotel room (R. 38, 40, 43-44). One month later, on February 13, 1976, petitioner applied for permanent resident alien status under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255 (R. 50-51, 124-128). He claimed that he was eligible for an investor status exemption under 8 C.F.R. 212.8(b)(4) (1976).[3]

[2]Upon application to an appropriate consular officer, an otherwise eligible alien may obtain a nonimmigrant business visa to conduct business in the United States, on a temporary basis, for the benefit of a foreign employer. A temporary business visitor will normally be admitted for only a period of six months or less. 8 C.F.R. 214.2(b) (1978). To obtain a nonimmigrant business visa, the alien must establish to the satisfaction of the consular officer that he has a foreign residence which he does not intend to abandon and that he will leave the United States voluntarily at the expiration of his authorized stay. 8 U.S.C. 1101(a)(15)(B).

[3]In applying for permanent resident status under Section 245, petitioner was required to show that an immigrant visa was immediately available to him when he made his application. Because he could not qualify for a preferential immigrant visa under Section 203(a)(1)-(7) of the Act, 8 U.S.C. 1153(a)(1)-(7), petitioner had to establish the availability of a non-preference immigrant visa under Section 203(a)(8) of the Act, 8 U.S.C. 1153(a)(8). To qualify for a non-preference immigrant visa, however, petitioner either had to comply with the labor certification requirements under Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14), or qualify for an investor status exemption under 8 C.F.R. 212.8(b)(4) (1976).

2. The District Director denied petitioner's application for adjustment of status. Because petitioner had established his American business well before his latest entry, the District Director found that petitioner had not acted in good faith either when he applied to the United States Consul in New Delhi for a nonimmigrant business visa or when he thereafter entered the United States under the guise of a business visitor for his Indian firm. Petitioner was granted until April 24, 1978, to depart voluntarily from the United States or be subject to deportation proceedings, in the course of which he would be able to renew his application for permanent resident alien status (Pet. App. 22a-24a).

Petitioner failed to depart voluntarily and deportation proceedings were begun. In those proceedings, petitioner conceded his deportability, renewed his application for permanent resident status as an investor, and applied alternatively for voluntary departure (Pet. App. 17a-18a). The immigration judge found, after a hearing, that petitioner did not meet applicable requirements to become a permanent resident alien as an investor (*id.* at 18a-20a). Even assuming that petitioner met those requirements, however, the immigration judge held that the application would be denied on discretionary grounds because petitioner had last entered the United States by concealing his pre-existing intention to remain permanently (*id.* at 20a-21a). The immigration judge ordered that petitioner be allowed to depart voluntarily, but that he should be deported if he failed to do so (*id.* at 21a).

The Board of Immigration Appeals affirmed the immigration judge's decision on the discretionary ground and again granted petitioner the privilege of voluntary departure (Pet. App. 14a-16a). On December 21, 1979, the court of appeals denied a petition for review and affirmed the Board's decision (*id.* at 1a-13a).

ARGUMENT

1. Petitioner contends that the Board of Immigration Appeals acted improperly by basing its denial of his application for permanent resident alien status on the undisputed fact that petitioner had entered the United States by fraud. Petitioner's contention is without merit, and it warrants no further review.

Prior to the enactment of Section 245, nonimmigrant aliens were required to leave and reenter the United States if they wished to apply for immigrant visas. Because this procedure placed a hardship on aliens who wished to change their status, Congress enacted Section 245 to allow the Attorney General, in his discretion, to adjust the status of nonimmigrant aliens without requiring them to leave the United States. *INS* v. *Bagamashad*, 429 U.S. 24 (1976). Because Section 245 exempts such aliens from normal immigration requirements by providing rights exceeding those that they would have had if they had not been admitted to the United States on a nonimmigrant basis, a Section 245 change in status constitutes "extraordinary discretionary relief," which will be granted only in meritorious cases. *Astudillo* v. *INS*, 443 F. 2d 525, 527 (9th Cir. 1971); *Ameeriar* v. *INS*, 438 F. 2d 1028, 1030 (3d Cir.), cert. dismissed, 404 U.S. 801 (1971); *Santos* v. *INS*, 375 F. 2d 262, 264 (9th Cir. 1967).

To secure an adjustment of status under Section 245, an alien must meet two tests. First, he must show that he fulfills the statutory requirements: namely, that he is eligible to receive a visa, that he is admissible as a permanent resident alien, and that a visa is immediately available for him. *Thomaidis* v. *INS*, 431 F. 2d 711 (9th Cir. 1970); *Gambino* v. *INS*, 419 F. 2d 1355, 1358 (2d Cir.), cert. denied, 399 U.S. 905 (1970); *Jarecha* v. *INS*, 417 F. 2d 220, 222 (5th Cir. 1969). Second, he must

persuade the Attorney General, acting through the Immigration and Naturalization Service, to exercise his discretion in favor of granting the application. *Ameeriar* v. *INS, supra*, 438 F. 2d at 1030; *Thomaidis* v. *INS, supra*; *Jarecha* v. *INS, supra*, 417 F. 2d at 223; *Chen* v. *Foley*, 385 F. 2d 929, 934 (6th Cir. 1967); *Tibke* v. *INS*, 335 F. 2d 42 (2d Cir. 1964).

In exercising its discretion, INS must consider the full factual record, and "due consideration [must] be given to the presence or absence of special equities." *Santos* v. *INS*, *supra*, 375 F. 2d at 264. The record shows that petitioner failed to prove the existence of any special equities, such as close family ties, that would argue in favor of granting his application. To the contrary, the evidence clearly established that petitioner had entered the United States by fraud in that he failed to disclose his preconceived intention to remain permanently. Every court of appeals that has considered the question has held that an alien's procurement of a nonimmigrant visa with a preconceived intention to remain in the United States permanently is a factor that may be considered in the denial of discretionary relief. See *Faddah* v. *INS*, 553 F. 2d 491, 495 (5th Cir. 1977); *Soo Yuen* v. *INS*, 456 F. 2d 1107 (9th Cir. 1972); *Ameeriar* v. *INS*, *supra*, 438 F. 2d at 1033 & n.6; *Chen* v. *Foley*, 385 F. 2d 929, 935-936 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968); see also *INS*

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[4]Petitioner contends (Pet. 12) that the decision in this case conflicts with the District of Columbia Circuit's decisions in *Brownell* v. *Carija*, 254 F. 2d 78 (1957), and *Brownell* v. *Gutnayer*, 212 F. 2d 462 (1954). In *Carija*, however, the court stated (254 F. 2d at 80): "It is quite true that, if an alien enters the United States on a temporary permission but with a determination to stay here if possible—meaning by any means possible,—so that his representations to the authorities are false or fraudulent or misrepresentative, he has not lawfully entered this country."

v. *Bagamasbad*, *supra*.[4] Moreover, the legislative history of Section 245 states that "only those aliens who enter the United States in good faith and without any intention of circumventing quota restrictions * * * shall be entitled to the benefits of section 245(a), as amended." S. Rep. No. 1651, 86th Cong., 2d Sess. 27 (1960).

The court of appeals fully considered and properly rejected petitioner's claim (Pet. App. 10a-11a; footnote omitted):

> [A]llowing the Service the discretion to deny section 245 relief to nonimmigrant aliens who enter in bad faith appears to comport with the proper administration of the statute. As previously noted, the Act distinguishes between immigrants and nonimmigrants and specifically requires those seeking nonimmigrant status to establish that they have no intention of abandoning their foreign residence and that they will depart voluntarily at the end of their authorized stay. We do not know whether [petitioner] would have received an immigrant visa had he applied for one in India with a true statement of his intent. But had the true facts been known, he clearly would not have received a nonimmigrant visa because he would not have been entitled to one. [Petitioner] did not seek entry into the United States to represent a foreign employer for a limited period; he instead sought entry to remain permanently and to run his own business here. To require the Service to disregard this misrepresentation by [petitioner] would effectively undercut the Act's requirement that nonimmigrants demonstrate their bona fide status. In contrast, permitting the Service to deny section 245 relief

> based on the nonimmigrant's lack of good faith protects the integrity of the consular procedures established by the Act.

In sum, the court of appeals correctly held that the denial of petitioner's application for adjustment of status was not an abuse of discretion.

2. Petitioner's contention that the court of appeals lacked jurisdiction to review the denial of his application for adjustment of status is frivolous. Under Section 106(a)(2) of the Act, 8 U.S.C. 1105a(a)(2), the courts of appeals have exclusive jurisdiction to review final deportation orders. See *Foti* v. *INS*, 375 U.S. 217 (1963). An alien cannot oust the court of appeals of jurisdiction by challenging only the denial of status adjustment aspect of the deportation order. *Bagamasbad* v. *INS*, 531 F. 2d 111, 113 n.3 (3d Cir.), reversed on other grounds, 429 U.S. 24 (1976).[5]

3. The court of appeals also correctly rejected petitioner's contention that it was unfair to require him to contest the denial of his status adjustment application in the context of a deportation proceeding.[6] As the court

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[5]*Scalzo* v. *Hurney*, 314 F. 2d 675 (3d Cir. 1963), upon which petitioner relies, was overruled in *Ameeriar* v. *INS*, *supra*, 438 F. 2d at 1035 n.1 (Gibbons, J. dissenting).

[6]Petitioner was clearly afforded all the process that was due. It is immaterial, therefore, that different procedures may apply in other circumstances (see Pet. 12-13). Petitioner sought to change his status from that of a nonimmigrant to that of an immigrant. The procedures prescribed in Section 248 of the Act, 8 U.S.C. 1258, apply only to changes from one nonimmigrant status to another. Because those procedures are inapplicable to persons in petitioner's position, they are irrelevant here.

of appeals remarked (Pet. App. 12a-13a):

> Although the regulations do preclude a direct administrative appeal from the denial by a district director of a section 245 application, 8 C.F.R. §245.2(a)(4), the alien is entitled to a de novo review of his application in the context of deportation proceedings. Id. We consider this dual opportunity to present a section 245 application to provide ample process, particularly in light of the discretionary nature of section 245 relief. The fact that the second consideration of the application takes place within the context of a deportation proceeding is irrelevant. Petitioner's argument to the contrary assumes that [petitioner] could have avoided deportation proceedings simply by choosing not to renew his section 245 application. However, since [petitioner's] deportability as an overstay was clear, the initiation of deportation proceedings was a matter over which he had no control.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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